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NO. 93-946

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM T. WULIGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPELLANT'S REPLY BRIEF

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On or about February 16, 1994, Respondent filed its three-page "Memorandum For The United States In Opposition." In that Memorandum, Respondent does

not contest Petitioner's Statement Of The Case And The Facts. Nor does Respondent contest the fact that this case presents important issues of federal statutory and constitutional law on which state courts and lower federal courts are in substantial and continuing conflict.

Rather, Respondent has limited its response to an argument that the issues presented by Petitioner herein are not ripe for adjudication by this Court.[1]

Petitioner respectfully submits that Respondent's argument lacks cogency in several respects. First, Respondent ignores the fact that Petitioner's appeal to

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[1]Respondent's argument is essentially that Petitioner's conviction was reversed by the Sixth Circuit Court of Appeals which further ordered the case remanded for new trial. Thus, Respondent argues that Petitioner's issues would be mooted by a subsequent acquittal and that, in the event of a subsequent conviction, those issues could be raised via appeal to the Sixth Circuit and certiorari to this Court at that time. However, as discussed below, Petitioner respectfully submits that the issues presented in his Petition are indeed ripe for review and that, even assuming, arguendo, that they were not, ripeness is not the determining factor in this Court's decision to exercise its jurisdiction.

the Sixth Circuit involved a request for an outright acquittal as a matter of law. Insofar as the Sixth Circuit ordered a remand for a new trial, that request for relief was denied. It is, therefore, difficult to comprehend how the Sixth Circuit's judgment as to that issue could possess any more finality following a retrial than it does at this moment.

Second, the government overlooks the immediate and irreparable harm that would inevitably result from a conviction following a retrial, even if that conviction were ultimately reversed upon appeal to this Court. In Ohio, when an attorney is convicted of a felony, he faces an immediate indefinite suspension of his license to practice law, regardless of the fact that an appeal may be pending and regardless of the merits of that appeal.[2] In the case at bar, in fact, following

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[2]Pursuant to Rule V (5) of the Ohio Supreme Court's Rules For the Government Of The Bar, The Ohio Supreme Court may indefinitely and summarily suspend an attorney upon proof of his conviction of a

Petitioner's January 1992 conviction, his Ohio license to practice law was summarily and indefinitely suspended by the Ohio Supreme Court, which was divided on the issue with three of the seven Justices dissenting. As a result, Petitioner was deprived of his right to practice law in Ohio for more than one year until his conviction was reversed on appeal, at which point the Ohio Supreme Court reinstated him. Thus, if Petitioner is retried and convicted based upon what Petitioner contends to be the erroneous principles of law set forth in the Sixth Circuit's opinion, he would be summarily deprived of his license to practice law in Ohio for another two years until a second appeal to the Sixth

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felony. Although couched in discretionary terms, the court's decision to indefinitely suspend an attorney under such circumstances is, as a practical matter, automatic. Following the indefinite suspension order, an attorney will be entitled to reinstatement, under the court's rules, only after his conviction has been reversed on appeal or, in the case of an affirmance of the conviction, only after a formal disciplinary hearing conducted after the appeal has been completed.

Circuit and certiorari to the Court could be completed. Thus, Petitioner may well face irreparable harm if the appeal of this case is deferred until after a retrial.

Third, finality or ripeness is not an essential prerequisite to the exercise of this Court's jurisdiction upon a petition for a writ of certiorari. E.g, Nixon v. Fitzgerald, 457 U.S. 731 (1982); Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976); Air Line Pilots Ass'n. International v. UAL Corp., 897 F.2d 1394 (7th Cir., 1990); 28 U.S.C. §§ 1254, 2101(e); Supreme Court Rule 18.

Rather, the more pertinent concerns governing this Court's discretionary appellate jurisdiction have traditionally been acknowledged to involve: (1) The need to resolve continuing conflict among lower federal courts in order to facilitate the uniform application of federal law;[3] (2) The need to resolve existing conflicts

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[3]E.g., Federal Trade Commission v. Flotill, Inc., 389 U.S. 179 (1967); Waterman S.S. Corp. v. United States,

between federal and state courts on matters of federal law subject to the concurrent jurisdiction of the two court systems;[4] and (3) The need to resolve troublesome questions regarding the administration of justice.[5]

The case at bar involves each of these concerns. The federal circuit and district courts are in continual conflict as to the meaning and scope of 18 U.S.C. §§ 2510, et seq., particularly with respect to the legality of interfamilial wiretaps. Moreover, the Sixth Circuit's opinion in this case has created additional conflict in holding that the presentation of admissible evidence during judicial proceedings can be deemed to constitute

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381 U.S. 252, reh denied 382 U.S. 873 (1965); N.L.R.B. v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965); United States v. Zacks, 375 U.S. 59 (1963); Richards v. United States, 369 U.S. 1 (1962).

[4]E.g, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Plumbers, Steamfitters, Refrigeration, Petroleum Fitters And Apprentices of Local 298, A.F. of L. v. Door County, 359 U.S. 354 (1959).

[5]E.g., Linkletter v. Walker, 381 U.S. 618 (1965); Hawkins v. United States, 358 U.S. 74 (1958).

criminal activity. In these respects, the decision of the Sixth Circuit herein is in conflict with the positions adhered to by the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh and District of Columbia Circuits.[6]

Similarly, the Sixth Circuit's opinion regarding the issues relating to impeachment and interfamilial interceptions is in conflict at least with three opinions emanating from Ohio State courts in ruling on the admissibility of intercepted evidence.[7]

Finally, as discussed more fully in the pending Petition, this case presents issues which are vital to the ongoing administration of justice in both the federal and state court systems, in terms of the propriety of various

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[6]See generally, Petitioner's Petition For A Writ Of Certiorari, pages 31-46.

[7]E.g., Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E.2d 910 (C.P. Stark Cty., 1974); Cooper v. Cooper, unreported, C.A. Cuyahoga County, Case Nos. 49605 & 50022 (1/23/86); Fluharty v. Fluharty, unreported, C.A. Summit County, Case No. C.A. 8951 (11/29/78).

evidentiary rulings and in terms of the ongoing chilling effect which the Sixth Circuit's decision will have upon zealous advocacy and the right to adequate legal representation.

Respondent, in its Memorandum, does not contest any of those compelling reasons for granting certiorari in the case sub judice. Rather, the government contends that these issues will become moot if Petitioner is retried and acquitted and that these issues may be presented two or three years from now in the event that Petitioner is retried and convicted.

What Respondent conveniently ignores is the fact that this case presents this Court with such a wide spectrum of significant issues as to the scope of the federal wiretap statutes that a decision on merits at this time may eliminate years of uncertainty, conflict and lack of uniformity among the state and lower federal courts.

This case involves substantial and well-defined

issues, developed in the context of a comprehensive evidentiary record and substantial briefing by both sides. Respondent's suggestion that this court refrain from hearing this matter until a second trial and appeal have been completed would do absolutely nothing to present a more developed record to assist this Court in its examination and resolution of these issues. Thus, the factual and legal background of this case provides sufficient concreteness to permit this Court's analysis and resolution of the issues without resort to mere speculation or hypothesis. A second trial will add nothing to the factual and legal basis of this case which would assist this Court in determining the issues presented herein.

Accordingly, for the foregoing reasons, Petitioner respectfully requests that this Court exercise its

discretionary jurisdiction and determine this case on its merits.

Respectfully submitted,

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